

18th February 1756. 8. 6

INFORMATION

F O R

Miss. *James Malcolm*, Daughter to the deceased *James Malcolm* Merchant of *Jamaica*, Defender ;

A G A I N S T

John Cameron, Son to *Alexander Cameron* of *Kinneard*, Pursuer.

TH E deceased *James Malcolm*, Father to the Defender, and Brother to the deceased Sir *John Malcolm* of *Lacbore*, having acquired a considerable Fortune in the *West-Indies*, he returned to this Country, and afterwards intermarried with *Elizabeth Durward* the Defender's Mother, and this Marriage subsisted till the Year 1742, when it was dissolved by the Predecease of the Husband, leaving one Daughter, and his Wife with Child of the Defender, her other Daughter, who was born upon the 14th of July 1742.

From this Period the Defender and her Sister continued to live in Family with their Mother, who for some Years past has resided in *Edinburgh* during the Winter, for the Education of her said Daughters, and during the Summer Season resided at *Lathbrish*, in the Shire of *Fife*, a small Purchase which had been made by Mrs. *Malcolm*, with her Daughters Money, some time after her Husband's Death.

Alexander Cameron, Father to *John Cameron* the Pursuer, is Proprietor of the Lands of *Kinneard*, a small Estate lying in the same County, about four Miles from *Lathbrish*; and it is generally reported that Mr. *Cameron's* Estate of *Kinneard*, which is about 3000 Merks of yearly Rent, is burdened with Debts and Liferents near to its Value.

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In the Month of *August* 1754, Mrs. *Malcolm* happened accidentally to meet with Mr. *Cameron* and his Lady, at the House of a Gentleman in the Neighbourhood, by which they became first acquainted together, which naturally produced an Intercourse of Visits between the two Families for some Months thereafter.

Tho' the Defender was at that Time but just past the Age of twelve, of a very small Growth, and in every Respect unfit for Marriage, yet as it was known, that the Defender, upon the Death of her Father, had succeeded to a Fortune of between 2 and 3000 *l. Sterling*, it appears that Mr. *Cameron* had about this Time formed a Scheme of possessing himself of the Defender's Fortune, by bringing about a Marriage between her and his Son *John* the Pursuer, who was then a young Man about 22 Years of Age, and living in Family with his Father.

In Prosecution of this Plan, every Opportunity was taken of doing Civilities to Mrs. *Malcolm* and her Daughters; and as often as they visited at *Kinneard*, Care was taken to show away [and represent Matters in such a Light, as might lead Mrs. *Malcolm* to believe that Mr. *Cameron* was possessed of an opulent Fortune, which was to descend to the Pursuer his eldest Son.

Matters being thus prepared, upon *Thursday* the 12th of *December* 1754, the Pursuer took Occasion to inform Mrs. *Malcolm*, that he was much in Love with the Defender her Daughter; that he had 3000 *l. Sterling* independent of his Father, as being the only Child of his first Marriage; and that his Father could put him in the Fee of an Estate of 500 *l. Sterling per annum*, free of all Debt; and tho' he proposed to go abroad for finishing his Education, yet he inclined to secure the Defender, by marrying her before he went abroad.

To this Proposal Mrs. *Malcolm* returned for Answer, that her Daughter was by much too young for Marriage, and that she had some Friends, whom she then mentioned, who behoved to be consulted before any such Proposal could be agreed to; but said, that if the Pursuer would go abroad for some Years to prosecute his Studies, and had such a Fortune as he mentioned, she doubted not but his Proposal would be agreeable to the Friends; upon which the Pursuer insisted, that his Proposal should not be mentioned to any Person; and in his Letter to Mrs. *Malcolm* of the 14th *December*, he writes to the same Purpose, desiring "that she should not mention a Word of what passed" at their last Meeting, even to the young Ladies."

Before this Conversation, it had been previously concerted, that as both the two Families at *Lathbrish* and *Kinneard* had thoughts of going
over

over to *Edinburgh*, that they should set out in Company together, upon *Monday* thereafter, being the 16th of *December* ; and accordingly, upon the Morning of that Day, Mrs. *Malcolm* set out from *Lathbrish* with her Family, consisting of her two Daughters, Mrs. *Hay* their Governess, a Boy, and a Maid Servant ; and about the same time, Mrs. *Cameron* did in like Manner set out, with her Sister Miss *Jean Cusnen*, and Mrs. *Ann Cameron* a Relation of her Husband's, who was then staying at *Kinneard*, the Pursuer *John Cameron* being also of the Party.

They all arrived about the same time at *Kinghorn*, from whence they went over in one Boat to *Leith*.

It was foreseen, that upon Mrs. *Malcolm's* going over to *Edinburgh*, she would naturally inquire, and get Information concerning Mr. *Cameron's* Circumstances, which could not bear to be canvassed by a Meeting of Friends ; and therefore it would appear, that it had been previously concerted between the Father and Son, that the Marriage should be celebrated that very Evening : And accordingly, upon their Arrival at *Leith*, they found Mr. *Cameron* the Father there ready to receive them, he having come down from *Edinburgh* for that Purpose.

Upon Mrs. *Malcolm's* Arrival on the Shore, she immediately gave Orders to her Servant Maid and Boy, to carry up the Baggage to her House at *Edinburgh*, to lay on Fires, and prepare every Thing for her Reception ; and at the same time proposed, that Mrs. *Hay*, the Governess of her two Daughters, being the Daughter of *John Hay* of *Jackisdale*, should go up in a Coach along with the rest of the Company. But it being foreseen, that her Presence would not contribute to the Scheme which was then in view, Mrs. *Cameron* objected to this Proposal, upon Pretence that Mrs. *Malcolm's* other two Servants were not acquainted with the Town of *Edinburgh* ; and by this Piece of Management it happened, that Mrs. *Hay* was accordingly immediately sent off with the other two Servants.

After staying for a short Time at *Leith*, it was next proposed that the Company should go together, and drink Tea at the House of Mrs. *Cusnen*, who was Mother to Mrs. *Cameron*, to which Mrs. *Malcolm* readily agreed ; and accordingly, the whole Company immediately set out in two Coaches from *Leith*, and arrived at the House of Mrs. *Cusnen* in the *Canongate*, where they found her and her Daughter Miss *Anne Cusnen* prepared to receive them ; and after Tea was over, Mrs. *Malcolm* rose up, in order to go home to her own House with her two Daughters ; but Mrs. *Cameron* having insisted that it would be better for her

her to sup with the Company, as her own House would not be sufficiently warmed, Mrs. *Malcolm*, who suspected nothing, readily agreed.

It was foreseen, that if Mrs. *Malcolm* and her Daughters should be late of coming home to their own House, that it would be natural for her Servants to enquire about them, and that for this Purpose, they might probably come to the House of Mrs. *Cusnen*; and therefore, in order to prevent Accidents of this Sort, between the Hours of eight and nine at Night, "a false Message was sent to Mrs. *Malcolm's* Servants, informing them," that she and her Daughters were not to come home that Night; upon which the Servants, who had no Reason to suspect the Truth of this Message, went all to Bed.

Matters being thus prepared, Mr. *Cameron* the Pursuer, immediately left the Company, and went out in quest of the holy Father, who was to tie the indissoluble Knot. And tho' the Laws of the Land have anxiously prohibited all Marriages without Proclamation of Banns, yet he was not long of finding a Tool fit for his Purpose, Mr. *John Foulis*, late one of the Ministers of the Episcopal Congregation at *Edinburgh*, who, it is likely, had been previously engaged to be ready at a Call.

In the mean time, the Company at the House of Mrs. *Cusnen* had supped; and after Supper, a Servant Maid having desired Mrs. *Malcolm* to speak to one, she went out of the Room in which the Company were; and within few Minutes thereafter, while Mrs. *Malcolm* was yet out of the Room, Miss *Anne Cusnen* desired the Defender to speak to one in a Bed-chamber, which was next to the Room in which the Company were sitting.

The Defender having accordingly gone into the Bed-chamber, she saw the Pursuer there, who desired her to sit down, he being there alone; and then having shut the Door, he said to the Defender, "*That unless she would agree to say to the Company when they came out, that she was willing to unite with him, that he would carry her off to some Place where she would never see her Mother again.*"

The Defender being frightened at this Threatning was easily prevailed upon to consent to any Thing, in order to get out of the Room; and accordingly he immediately carried her out of the Bed-chamber, and through a Trance into a Room in the other End of the House, where her Mother and Mr. *Cameron* the Father were sitting; and upon their coming in, the Pursuer said to Mrs. *Malcolm*, *that he had now obtained her Daughter's Consent*; to which Mrs. *Malcolm* answered, that if her Daughter had given any such Consent, she would
never

never see her Face again ; and upon the Defender's denying that she had ever agreed to marry the Pursuer, Mr. *Cameron* elder, and Miss *Anne Cusnen* having laid hold of the Defender, they kept her in that Room, for about the Space of a Quarter or Half an Hour, when the Pursuer returned, bringing Mr. *Fowles* the Minister along with him; Mrs. *Malcolm* having been out of the Room for Part of that Time, upon a false Message delivered to her by Mrs. *Cameron*, that her Daughter Miss *Emilia* wanted to speak with her.

About the Time when the Minister was first brought in, Mrs. *Malcolm* again returned to the Room, in which the Defender was ; and upon observing the Minister, and understanding the Purpose for which he had come, she told him she was against the Marriage, and therefore discharged him to marry her Daughter, *and that if he did, she would make him answer for it.* But Mr. *Cameron* the Father having still insisted in a riotous Way, that the Minister should proceed to perform the Ceremony, Mrs. *Malcolm* left the Room, to try if she could prevail on the Ladies in the House, to interpose in the Matter; and upon her going out of the Room, the Farce of a Marriage was celebrated between the Pursuer and the Defender.

The Confusion and Terror under which the Defender then was was such, that it is impossible for her to recollect every Circumstance which passed upon that Occasion : But there is undeniable Evidence before your Lordships, that she had no sufficient Understanding of the Matter which was then going on, from the Pursuer's own Declaration ; for there he expressly declares, *That after the Defender had repeated the Responses, as directed by the Service, when the Minister proceeded to read the Prayers, she repeated them also, until the Minister stopt her, saying, that they need not be repeated.*

Such were the Circumstances which attended the Celebration of this unnatural Marriage, as they are set forth in the Defender's Declaration, which carries in its Bosom the genuine Marks of Truth, and is supported by extrinsick Evidence, as far as could be expected in a Case, where the Pursuer had artfully contrived Matters, so as to have the Choice both of the Place and of the Witnesses present : And soon after this Farce of a Marriage was over, the Pursuer made the Defender sign her Name to the Marriage Lines, by leading her Hand, of which there is in some Degree real Evidence, from her Subscription adhibit-

ed to these Lines, which differs considerably from her ordinary Subscription, as it is adhibited to her judicial Declaration.

The Ceremony, such as it was, being thus over, it was next proposed, that the Marriage should be concluded by a formal Bedding. But as the Defender had by this Time got into the Room in which her Mother was with the rest of the Company, this was strenuously opposed by her Mother, till at last Mr. *Cameron* the Father, having taken both the Mother and Daughter out of the Company, fell upon an Expedient to separate the Mother from the Daughter, as mentioned in Mrs. *Malcolm's* Deposition; and upon this, the Pursuer carried the Defender to the Bed-chamber in which the Ceremony had been performed, where they proceeded so far as to tear off Part of the Defender's Cloaths; upon which she fell a crying; and thereupon, the Mother having forced into the Room where the Defender was, and having threatened to alarm the Neighbourhood, they thought it prudent to desist; and soon thereafter Mrs. *Malcolm* was allowed to go home, and her two Daughters.

For some Days thereafter, Mrs. *Malcolm* was put off with fair Promises, that the Marriage-lines were to be delivered up, and that there was to be no more of the Matter; but finding at last, that these Promises were not meant to be kept, after advising with the Friends of her Daughter, a Declarator was brought, at her Instance, against the said *John Cameron*, concluding, that it might be found and declared, that she was not married to the said *John Cameron*, and that he should be decerned to desist from asserting that she was his Wife, or he her Husband, in all time coming.

By Way of Defence against this Action, Mr. *Cameron* thought proper to bring a Declarator of Marriage; against which, the following Defences were humbly offered, 1st, That the Defender had never given any free or full Consent, such as was sufficient to constitute a Marriage with the Pursuer. 2^{dly}, That at the Time when this pretended Marriage is supposed to have been celebrated, she had not arrived at that Maturity, either in Years or of Body, which was essential and necessary to Marriage. And lastly, It was alledged, that as this pretended Marriage had never been consummated, and as the Defender had *de recente* declared her Purpose to refile from it, she was intitled to be restored in respect of her young and tender Years.

Upon advising the Libel, Defences and Answers, your Lordships pronounced an Interlocutor, ordaining both Parties to appear personally in Court, in order to make Answers to such Questions as should be

put

put to them ; and the Pursuer having accordingly appeared, in Obedience to this Interlocutor, he emitted a very extraordinary Declaration, containing some Particulars which cannot possibly gain Credit with any Mortal, some of which are now to be mentioned.

In the Beginning of this Declaration he avers, “ That about Half-
“ low-even 1754, he proposed Marriage to the Defender, in the Dining-room of *Lathbrish*: That there were none present but themselves
“ two: That she said she was at her Mother’s Disposal, and would do
“ nothing without her Consent, who was very fond of him ; *that it*
“ *would make her extremely happy if he could obtain her Mother’s Consent,*
“ and that at that Time, the Defender made the Declarant a Present
“ of a Shell for a Snuff-box.”

To the same Purpose, a little further down in the said Declaration, he declares, that while he and the Defender were together in the House of Mrs. *Cusnen* before the Marriage, “ He told the Defender
“ of his Intention to marry her, and she said SHE WISHED HIS FATHER
“ MIGHT AGREE TO IT, FOR IT WOULD MAKE HER VERY HAPPY;
“ upon which he and she went into the Room where his Father and
“ Mrs. *Malcom* were, and heard the Defender say, THERE WAS NO-
“ THING WANTING TO MAKE THEM HAPPY, BUT THE DECLARANT’S
“ FATHER’S CONSENT.”

Your Lordships will observe, that in both these Instances, the Pursuer is making this Infant, who was then only about 12 Years and four Months old, talk with more Coolness and Sagacity, than could have been expected in the like Circumstances from a Woman of three Times that Age. It is left with your Lordships to judge, how this can gain Credit with any Mortal, or how it can gain Credit, that an Infant of these tender Years could feel the Power of Love in so strong a Degree, as could produce such ardent Expressions of Regard toward the Pursuer.

There is another Circumstance which is extremely improbable in this Declaration. From the first Part of it, he would have your Lordships believe, that the Courtship and first Advances had begun on the Side of the Defender and her Mother ; and he expressly says, that he had told Mrs. *Malcolm* when she made the first Proposal to him, a few Days before the Marriage, “ That he had at present no great Inclination for Marriage ;” and yet, from the last Part of this very Declaration, as well as from the whole of the Proof adduced on both Sides, it appears beyond Dispute, that the pressing to have the Marriage upon that Day on which it is said to have happened, came wholly from him,

him, and that neither the Defender nor her Mother, had any Thoughts of its being celebrated that Evening before that Proposal was made by the Pursuer :-----Upon advising the Declarations of the Parties, and the former Proceedings, your Lordships pronounced an Interlocutor, dated the 17th June last, *Before Answer allowing the Pursuer a Proof of his Libel, and the Defender a Proof of her Defences, and of all Facts and Circumstances tending to elide the Libel, and a conjunct Proof to each Party anent the Premises.*

In pursuance of this Interlocutor, a great Number of Witnesses have been adduced for both Parties; and your Lordships having ordained Informations to be given in upon the whole Cause, what follows is humbly offered on the Side of the Defender,

And here the Defender does not deny, that the Pursuer has brought a Proof, that the Marriage Ceremony was performed, by the Oath of Mr. *Fowlis* the Minister, by whom it is said to have been celebrated, and by the Oaths of Mrs. *Anne Cameron*, and two of Mrs. *Cusnen's* Daughters ; and these Witnesses do further say, that the Defender and her Mother had both given their Consent at the Time of the Marriage.

But in the *first* Place it is to be observed, that these Witnesses are very far from being unexceptionable. Mr. *Fowlis* the Minister had been guilty of a very high Crime, in marrying so young a Girl, without Proclamation of Banns ; and both he and the other Witnesses alleged to have been present at the Marriage, and who were nearly connected with the Pursuer, were plainly under a very strong Bias, to represent Matters in the most favourable Light for themselves ; and therefore all these Witnesses lye under a just Ground of Suspicion.

More especially when it is considered in the 2d Place, That the Tale told by these Witnesses, when joined to that told by the Pursuer, is highly improbable. They represent it as if the first Proposals of Marriage had come from the Defender and her Mother ; and further say, that they had both given a full and free Consent at the Time of the Marriage ; and yet it is proved by concurring Testimonies of severals of the Witnesses adduced for the Pursuer, that the Defender and her Mother had obstinately refused to compleat the Marriage by the Form of a Bedding, when that was proposed by the Pursuer, and had left the House in very bad Humour. It is submitted to your Lordships, how consistent this is with the first Part of the Story, that the Defender and her Mother had been so very forward in the Matter, as to be the first Proposers of the Marriage to the Pursuer.

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But 3thio, The Matter does not rest here ; for the Tale told by the Pursuer and his Witnesses is in every material Circumstance contradicted by the Witnesses adduced for the Defender.

In the 1st Place, it is proved, That upon the *Thursday* before this Marriage is said to have happened, the Pursuer, for the first Time, made his Proposals to Mrs. *Malcolm* ; that in order to prevail upon her to give her Consent, he had falsely represented his Estate to be much higher than it really was ; and that she had refused to give her Consent till such Time as she should advise with the Defender and her Friends.

This is proved by the Oath of Mrs. *Malcolm*, who depones, “ That P. 4. of the
 “ the same Day, (being the *Thursday* before the Marriage) the Depo- Defender’s
 “ nent being to visit her Mother at *Dysart*, the Pursuer accompanied Proof.
 “ her Part of the Way ; and as he was riding along with her, he told
 “ her, that he had a great Affection for her Daughter the Defender ;
 “ that he had 3000 *l.* of his own, independent of his Father ; and that
 “ his Father’s Estate was 500 *l.* a Year, free of Debt ; and that he was
 “ his only Son : That tho’ he proposed to go abroad for finishing
 “ his Education, yet he wanted to be secure of the Defender, by mar-
 “ rying her before he went abroad : That the Deponent answered,
 “ she could do nothing in that Matter, until she acquainted Mr. *Grant*
 “ of *Dalvey*, and her Daughter’s other Friends, and if they were pleas-
 “ ed she would have no Objection.”

Isobel Durward, Spouse to *Robert Thomson* Town-clerk of *Dysart*, one of the Witnesses adduced for the Pursuer, depones, “ That about the P. 40. of
 “ End of the last Year, the Defender, with her Mother and Sister, came Pursuer’s
 “ to make a Visit to the Defender’s Grandmother, at the Deponent’s Proof.
 “ House in *Dysart*, and that the Defender’s Mother told the Depo-
 “ nent, that the Pursuer had conveyed them to *Gallowtown*, which is
 “ about Half a Mile from *Dysart*, and that the Pursuer and Mrs. *Ca-*
 “ *meron* of *Kinneard*, with some of Mrs. *Cameron*’s Family, were to set
 “ out for *Edinburgh* alongst with her the Defender’s Mother, the
 “ *Monday* thereafter. Depones, That at this Visit the Defender’s Mo-
 “ ther acquainted this Deponent, that the Pursuer had proposed Mar-
 “ riage to her Mrs. *Malcolm*, for her Daughter the Defender : That
 “ the Deponent objected against the Defender’s marrying any body as
 “ yet, for that she was too young ; and that the Defender’s Mother
 “ said it was proposed, that the Pursuer should go abroad immediate-
 “ ly after the Marriage, without any Cohabitation with the Defen-
 “ der ; and further said, that the Pursuer had told her, his Father was

“ worth 500 l. a Year, besides 3000 l. which the Son had of his own,
 “ independent of his Father ; but the Defender’s Mother told, that
 “ she was resolved to conclude nothing without the Consent of Mr.
 “ *Grant of Dalvey*, one of the Defender’s Tutors ; and further, that she
 “ would do nothing without acquainting her other Frinds, and particu-
 “ larly the Deponent’s Husband, the the Deponent being Aunt to the
 “ Defender, that is to say, her Mother’s Sister.”

P. 38. of
 Pursuer’s
 Proof.

And with this Witness the said *Robert Thomson*, Town-clerk of *Dy-
 sart*, concurs, who swears to a Conversation he had with Mrs. *Mal-
 colm*, much in the same Terms with that which had passed between her
 and his Wife.

2dly, It is proved, that a Scheme or Plot had been previously laid
 by the Pursuer and his Friends, for celebrating the Marriage that E-
 vening upon which they came over from *Kinghorn*: That this Scheme
 was not communicated to the Defender or her Mother ; but that on
 the contrary it was artfully contrived so, that none should be present as
 Witnesses but such as were in the Pursuer’s Interest.

This appears clearly from the following Circumstances: 1st, From
 Mr. *Cameron* the Father his being ready to receive them on the Shore
 the Moment they arrived. 2dly, From the Art and Contrivance used
 by Mrs. *Cameron* in sending off Mrs. *Hay* along with Mrs. *Malcolm*’s
 other Servants. And lastly, from the false Message which was sent to
 Mrs. *Malcolm*’s Servants, with a View to prevent their coming to the
 House of Mrs. *Cusnen* about the Time of the Marriage.

The first of these Circumstances is proved by the whole of the
 Witnesses who came over in the Boat with the Pursuer and the De-
 fender, who all concur in deponing, that they found Mr. *Cameron* at
Leith when they came over.

The second Circumstance, which relates to the Manner in which
 Mrs. *Hay* was sent off from *Leith*, is proved by the Oath of Mrs. *Mal-
 com*, who depones, That upon their coming over the Water, “ old
 “ Mr. *Cameron* met them at *Leith*: That the Deponent ordered her
 “ Servant-maid and Boy to carry up the Baggage to her House in *E-
 “ dinburgh*, and put on Fires: That the Deponent inclined that Mrs.
 “ *Hay*, her Daughters Governess, should have staid and gone up in
 “ the Stage-coach with them ; but Mrs. *Cameron* said, that it was bet-
 “ ter that she should go along with the Deponent’s Servants, and she
 “ might instantly get a Ticket in the Stage-coach, while the Compa-
 “ ny were resting themselves at *Lieth*, and desired the Pursuer to get
 “ the

P. 5. of De-
 fender’s
 Proof.

“ the Ticket; but the Tickets being all out Mrs. *Hay* went up to *Edinburgh* on her Foot.”

And with this Witness concurs Mrs. *Hay*, who depones, “ That P. 26. of
Defender's
Proof. when they came to *Leith*, Mrs. *Cameron* of *Kinneard* proposed, in Presence of Mrs. *Malcolm*, that as she, the Deponent, was better acquainted than Mrs. *Malcolm*'s other Servant, she should therefore go up to *Edinburgh*, and get Fires put on for Mrs. *Malcolm* in her Lodgings there: That accordingly this Deponent walked up to *Edinburgh*, the Pursuer having first gone to seek for a Ticket in the Stage-coach for her, but could not find any.”

And for proving the last Circumstance, that a false Message had been sent to Mrs. *Malcolm*'s Servants, informing them that she and her Daughters were not to be Home that Night, the Defender refers to the following Witnesses. Mrs. *Hay* depones, “ That about eight o'Clock P. 26. of
Defender's
Proof. at Night, *Anne Johnston*, the Servant-maid in the House, told this Deponent, that a Woman had brought a Message to the Door, and which Message the said Woman said she had got from a Gentleman, and that the message, was that Mrs. *Malcolm* had come to Town, but was not to be at Home that Night; and that immediately before the Servant-maid told the Deponent this, she the Deponent heard a Knock at the Door, and upon coming to enquire who had called, the Servant-maid told her of the above Message. Depones, that upon hearing the said Message from the Servant, and the Deponent not expecting Mrs. *Malcolm* Home that Night, she, the Deponent, and the other Maid-servant, a Boy, and a little Girl, who were all that were in the Family, went to Bed at the usual Time; and this Deponent having fallen asleep, she was wakened by Mrs. *Malcolm*'s coming Home. Depones, that Mrs. *Malcolm* seemed surprised at the Deponent's having gone to Bed, and asked her the Reason; upon which this Deponent told her of the above mentioned Message.”

William Lilburn, depones, “ That betwixt eight and nine that Evening, the Deponent heard the Maid-servant, whose Name was *Anne Johnston*, tell Mrs. *Hay*, that a Woman had come to the Door, who had brought a Message, that Mrs. *Malcom* was not to be at Home that Night; and that immediately before this, the Deponent heard a Rap at the Door of the House, upon which the said *Anne Johnston* had answered the Door: That the Deponent went to Bed betwixt eleven and twelve, and next morning, when he wakened, was told that Mrs. *Malcolm* had come Home very late that Night.”

And

P. 14. of
Defender's
Proof.

And Mrs. *Malcolm*, after mentioning the manner of her leaving the House of Mrs. *Cusnen*, depones, " That when she came to her own Door, she found it shut, and that her Servants had gone to Bed ; but after beating at the Door, and waiting for some Time, the Door was at last opened. And further depones, That when she quarrelled the Servant that opened the Door for having gone to Bed, she said, very pretty Madam in you, seeing at eight o'Clock at Night a Servant came with a message, as she said from a young Gentleman, acquainting that the Deponent was come to Town, but was not to be at Home that Night."

P. 15. of
Defender's
Proof.

It is indeed true, that *Anne Johnston* the Servant-maid referred to in the above Depositions, and who has been adduced as a Witness by the Pursuer, gives a different Account of this Matter, and says, That the Import of the Message was, that *Mrs. Malcolm was come to Town, and was coming Home that Night* ; but as this is contradicted by the Oaths of the three other Witnesses already mentioned, who have sworn to the Import of the Message as communicated to them by *Anne Johnston*, no Regard can be had to the Oath of this Witness ; more especially when it is considered, that a Message in the Terms deponed to by this Witness would have been quite ridiculous. For where could be the Use of sending a Message to the Servants, that *Mrs. Malcolm* had come to Town, and was to be home that Night ? which without such Message they had Reason to expect, as they themselves had come over with her to *Leith*, and had been sent to her House in *Edinburgh*, to prepare Matters for her Reception ; and indeed, from Circumstances to be after mentioned, there is too much Reason to suspect, that undue Means have been used with this Witness, by which she has been brought to depone in the Manner she has done.

The Defender has been particular upon this Part of the Evidence, as it clearly proves, that the Plan of this Marriage had been previously concerted between the Pursuer and his Friends, and that Matters had been artfully contrived so as that no Person should be present at the Marriage, or even in the House at the Time when it happened, but such as were in the Interest of the Pursuer.

And there is real Evidence before your Lordships, that at the Time when Mrs. *Malcolm* went to the House of Mrs. *Cusnen*, she had no Expectation that any Marriage was to be celebrated that Evening ; for the whole of the Witnesses, who were in the House of Mrs. *Cusnen*, concur in deponing, that immediately after Tea, Mrs. *Malcolm* proposed

posed to go home with her two Daughters, tho' she afterwards agreed to stay upon her being pressed to it by the rest of the Company.

And, *3tio*, tho' the Pursuer had artfully contrived Matters, so as to deprive the Defender as far as possible of all Means of Proof, yet there is satisfying Evidence, that neither the Defender nor her Mother had ever given their Consent to this Marriage, but that on the contrary the whole was the Effect of Force and Compulsion.

This is proved in the first Place by the Oath of Mrs. *Malcolm*, who depones in Substance, That neither she nor her Daughter ever did consent to the Marriage: That on the contrary, she remonstrated against it in the strongest Terms: That when the Minister was sent for, without any Authority either from her or the Defender, she had expressly discharged him to celebrate the Marriage as he would be answerable: That she had in like Manner expressly discharged him to make out the Marriage Lines; and that during all that Time, and particularly at the Time when the Ceremony was performed, the Defender was struggling to get free but could not: That after all this was over, an Attempt was made to compleat the Marriage by a formal Bedding, and that they had actually proceeded so far, as to tear off Part of the Defender's Cloaths: That upon this she fell a crying, and her Mother having threatened to alarm the Neighbourhood, they were at last prevailed upon to allow the Defender to go home with her Mother and Sister. And it further appears from the Oath of Mrs. *Malcolm*, That about the Time when the Minister came first to the House, she Mrs. *Malcolm* was called out of the Room, upon a false Message delivered to her by Mrs. *Cameron*, that her Daughter Mrs. *Emilia*, who was in the other Room, wanted to speak with her.

And tho' the Oath of Mrs. *Malcolm* is single as to many of the above Particulars, and behoved to be so, as Care had been taken to exclude all Witnesses who were not in the Pursuer's Interest, yet her Oath is in many Particulars supported by the Oath of *Emilia Malcolm* the Defender's Sister, who was in the House of Mrs. *Cusnen* during the whole of the Time while this Affair was going on, tho' she had not Opportunity to see much of it, as during almost the whole of the Time she remained in the Drawing-room with Mrs. *Cusnen*, and the rest of the Company.

This Witness, depones, " That after Tea, her Mother was prest by Mrs. *Cameron* to stay Supper, which she agreed to, and accordingly did stay: That after Supper the Deponent's Mother Mrs. *Mal-* " *colm*, was called out of the Room to speak to one, which she did,

“ and a little after this the Deponent’s Sister, the Defender, was called
 “ out, upon which she likewise left the Room : That in a little after this,
 “ Mrs. *Malcolm* came into the Drawing-room, where the Deponent was
 “ sitting, and asked her, what she wanted with her? To which the De-
 “ ponent answered, that she wanted nothing with her : That immediate-
 “ ly after this, Mrs. *Malcolm* went out of the Drawing-room into the
 “ next Room, and she the Deponent followed her into it, and there heard
 “ her say to Mrs. *Cameron*, That if she Mrs. *Cameron* would allow the
 “ Defender her Daughter to go home that Night, she would bring her
 “ back any Hour the next Day that Mrs. *Cameron* pleased: That in a
 “ little after this the Deponent returned to the Drawing-room with-
 “ out her Mother, where she found Mrs. *Cusnen* and her two Daugh-
 “ ters, where she left them : That in a little after Mrs. *Malcolm* re-
 “ turned into the Drawing-room, all in Tears, leading the Defender
 “ by the Hand ; and some little Time after this, Mr. *Cameron* of *Kin-*
 “ *neard* came into the Drawing-room, and called out Mrs. *Malcom*,
 “ who immediately went along with him, leading her Daughter the
 “ Defender in her Hand, who she thought went along with her with
 “ Reluctancy ; and being asked, why she thought the Defender went
 “ along with her Mother with Reluctancy, says, she really thought
 “ so, but can render no Reason : That in two or three Minutes there-
 “ after she heard Noise in the House, and heard her Sister, whose
 “ Voice she is well acquainted with, crying: That in a little after,
 “ Mrs. *Malcom* returned to the Drawing-room, leading the Defender
 “ by the Hand ; and in a little after was told, that there was four
 “ Chairs waiting at the Stair-foot to carry her and her Daughters
 “ home: That upon Mrs. *Malcolm*’s going away, the Pursuer took
 “ hold of the Defender, and endeavoured to push Mrs. *Malcolm* a-
 “ way from her, saying, He would not let the Defender go, for she
 “ was his Wife ; upon which Mrs. *Malcolm* cried out three Times ;
 “ and thereafter, Mr. *Cameron* of *Kinneard* interposed, saying, Let the
 “ Defender alone, it will be better to see what can be done by fair
 “ Means: That immediately Mrs. *Malcolm* went into her Chair, and
 “ took her Daughter the Defender alongst with her, whereupon she
 “ heard Mr. *Cameron* of *Kinneard* say, By God we are nick’d.’

2dly, The Oath of Mrs. *Malcolm* is supported also by the Oaths of
 severals of the Pursuer’s Witnesses, who, tho’ they have adventured to
 say, that the Defender and her Mother had both consented to the
 Marriage, yet they have been obliged to admit, that the Company
 parted in very bad Terms. Tho’ they would have your Lordships believe,
 that

that this was occasioned by the Pursuer's Proposal of compleating the Marriage that Evening by a formal Bedding.

That the Company were in bad Terms, at least at parting, appears not only from the Oaths of Mrs. *Malcolm* and *Emilia* her Daughter, but also from the Oaths of the following Witnesses adduced by the Pursuer. *Jean Cusnen*, depones, " That she thought both the Defen-
 " der and her Mother abundantly chearful all the abovementioned
 " Night, until a little before they went home, when both the De-
 " fender and her Mother appeared to be uneasy, but she did not hear
 " either of them express the Reasons of their Uneasiness." Page 25th of Pursuer's Proof.

Mrs. *Cameron* depones, That after the Marriage, the Pursuer, and
 Defender's Mother, appeared " to be in bad in Humour, and the De-
 " fender's Mother complained, that the Pursuer had broke Terms
 " with her, for that he insisted for a Bedding that Night contrary to
 " their Agreement." Page 36th of Pursuer's Proof.

And Mrs. *Cusnen* depones, That upon the Pursuer's saying, that
 the Chairs were ready, " Mrs. *Malcolm* got up and said it was Time
 " for her to be gone, when she was desired to go, and went off ab-
 " ruptly to the Door, without taking any Leave of the Deponent,
 " who followed her to the Door." Page 48th of Pursuer's Proof.

It is further proved, that the Pursuer and his Associates were so
 far conscious that they had done an egregious Wrong, that upon the
 Morning immediately after the Marriage, and for some Days there-
 after, Offers were made by the Pursuer of passing from the pretended
 Marriage, and giving up the Marriage Lines. Mrs. *Malcolm* de-
 pones, " That the same Day in the Morning, (i. e. upon the Day af-
 " ter the pretended Marriage) Miss *Anne Cameron* came to the Depo-
 " nent's House, and finding the Deponent and her Daughter in Bed
 " weeping, she desired that they might dry up their Tears, lest the
 " Servants should observe them; and she told the Deponent, that old
 " Mr. *Cameron*, and the Pursuer his Son, were both in great Concern
 " at what had past, and that they had endangered their Lives; and
 " therefore begged that the Deponent might conceal it, and make no
 " Complaint, and they would deliver up the Marriage Lines, and
 " give any Security that the Deponent should desire, to undo what
 " had been done; and that if the Pursuer had not been drunk, he
 " never would have acted as he did." Page 16. of Defender's Proof.

And further depones, " That that very Day the Pursuer came to
 " the Deponent, and talked to her in Substance to the same Purpose
 " with what Mrs. *Anne Cameron* had said as above; and particularly
 " the the End." Page 16, De- fender's Proof, near the the End.

“ the Pursuer said to the Deponent, with Tears in his Eyes, that had
 “ it not been for the Hazard which Mr. *Fowles*, Mrs. *Anne Cameron*
 “ and Miss *Cusnen* had brought themselves into, by what had hap-
 “ pened the Night before, he the Pursuer would not so easily have
 “ given it up: That the Pursuer promised at that Meeting, that his
 “ Father should come up next Day, and deliver up the Marriage
 “ Lines.”

Page 27. of
 Defender's
 Proof.

And Mrs. *Malcolm's* Evidence, with regard to this Particular, is
 in Part supported by the Oath of Mrs. *Hay*, who depones, “ That
 “ next Morning (*i. e.* the Morning after the pretended Marriage)
 “ Miss *Anne Cameron* came up to Mrs *Malcolm's* House, and the De-
 “ ponent having gone into Mrs. *Malcolm's* Room, who was then
 “ in Bed, to acquaint her that Miss *Cameron* was waiting, Miss *Came-*
 “ *ron* rushed into the Bed Room: And the Deponent observed both
 “ Miss *Cameron* and Mrs. *Malcolm* in Tears; and heard Miss *Ca-*
 “ *meron* say, that there would be no more of it, and that had not Mr.
 “ *Cameron* been drunk, he never would have been so rude to a Lady :
 “ And the Deponent heard also Miss *Cameron* desire Mrs. *Macolm* to
 “ be very silent, for that otherwise the Servants would observe that
 “ something extraordinary had happened.”

And lastly, to sum up all, it is proved, that *Alexander Cameron* of
Kinneard, Father to the Pursuer, and who is the Conductor and Ma-
 nager of this Cause, had adventured to proceed so far as to offer a
 Bribe of 100 *l. Sterling* to Mrs. *Hay*, the Defender's Governess, upon
 Condition that she would swear that there was a Marriage concerted
 between the Pursuer and the Defender at *Lathbrish*.

This Part of the Evidence is so very material, that the Defender
 hopes she shall be forgiven in subjoining the Proof at full Length.

Page 38. of
 Defender's
 Proof.

Mrs. *Hay* depones, “ That a few Days after Mrs. *Macolm* left her
 “ own House in *Gavinlocks's* Land, which she thinks she left upon
 “ *Christmas* Evening last, she, the Deponent, received a Message by
 “ a Maid-servant, who said she was sent by a *Fife* Lady to desire the
 “ Deponent to come and speak with her in a Shop below: That im-
 “ mediately the Deponent calling upon *William Lilburn*, and ordering
 “ him to light the Lanthorn, went down Stairs: That the Maid de-
 “ sired the Deponent to send back the Boy, saying, That the *Fife*
 “ Lady had desired that none of the Family should come alongst with
 “ her: This the Deponent refused to do, and carried the Boy alongst
 “ with her: That upon their coming down the Length of *Cleland* the
 “ Vintner his Close Head, the Servant-maid went aside, saying, that
 “ she

“ she had forgot the Name of the Place where the Deponent was to go
 “ to, and immediately went off; upon which Mr. *Cameron* of *Kin-*
 “ *neard* came up with the Deponent, and told her that he was the
 “ Person that wanted to speak with her, and desired her to go to some
 “ House where she was acquainted, for that he had something to speak
 “ to her; but the Deponent not knowing of any Place where to carry
 “ him, proposed going up to Mrs. *Malcolm's* House, which he declin-
 “ ed, saying he was afraid the little Girl, a Servant in the House,
 “ would know him, and proposed to the Deponent to go down to
 “ Miss *Annie Cameron's*, who had wanted to speak to her of a long
 “ Time: That in the Way thither, he took Occasion to ask the De-
 “ ponent if she knew of a Courtship betwixt the Pursuer and Defen-
 “ der at *Lathbrish*, alledging, she could not miss to know of it, and
 “ if she knew that it was concerted at *Lathbrish* that the Pursuer and
 “ Defender were to be married together; to which she answered,
 “ that she did not know any Thing either of the Courtship or any
 “ such Concert, nor never heard of it: That thereupon he offered
 “ the Deponent 100 *l. Sterl.* if she would swear that there was a
 “ a Marriage concerted betwixt the Pursuer and Defender at *Lathbrish*,
 “ and that if she was to meet with any Uneasiness from Mrs. *Mal-*
 “ *colm* on Account of her being with him that Night, he would
 “ take her into his own House; which she refused, saying, she could
 “ swear no such Thing, and it would be wrong in her if she did, as
 “ she knew nothing of the Matter: That in Miss *Annie Came-*
 “ *ron's* House, in Presence of Miss *Annie Cameron* and the Pursu-
 “ er, Mr. *Cameron* asked the same Question, but did not repeat the
 “ Offer: That Mr. *Cameron* in conveying the Deponent home, re-
 “ newed the same Offer of 100 *l.* upon the Conditions abovemention-
 “ ed, which the Deponent again refused: That he asked her if she
 “ thought the Boy, meaning *William Lilburn*, knew him, and beg-
 “ ged it as a Favour of her, that she would not let it be known what
 “ had passed between them, if the Boy did not know him; upon
 “ which the Deponent said, she was pretty sure the Boy could not miss
 “ to know him, as he had seen him so often at *Lathbrish* and *Kin-*
 “ *neard*; and that if he did not know him, she the Deponent should
 “ never let the same be known: That afterwards she found that the
 “ Boy did know him, and so she thought she was afterwards at
 “ Liberty to let the Thing be known.”

And the Evidence of this Witness is in Part supported by the Oath Page 33. of
William Lilburn, who depones, “ That after Mrs. *Malcolm* had thus Defender's
Proof.

“ left the House, one Evening there came a Message to Mrs. *Hay*, de-
 “ firing her to come and speak to a *Fife* Gentlewoman: That
 “ Mrs. *Hay* first proposed sending the Deponent with a Lanthorn to
 “ bring up the said Gentlewoman; but the Servant who had brought
 “ the Message said, that the Gentlewoman would not come up Stairs:
 “ That upon this Mrs. *Hay* went down Stairs alongst with the Ser-
 “ vant, and the Deponent attended them with a Lanthorn: That
 “ when they were on the Street, the said Servant proposed to Mrs. *Hay*
 “ to send back the Deponent with the Lanthorn, but Mrs. *Hay* said
 “ that the Deponent should go wherever she went: That about
 “ the Head of *Cleland* the Vintner’s Close, Mr. *Cameron* of *Kinneard*,
 “ the Pursuer’s Father, met them: That before he came to them, the
 “ Servant-maid, who was along with Mrs. *Hay*, went off from Mrs.
 “ *Hay*, alledging she was looking out for the Close whereabout the
 “ *Fife* Gentlewoman was, in order to carry Mrs. *Hay* there: That
 “ the Deponent was walking before Mrs. *Hay* with his Lanthorn
 “ when Mr. *Cameron* came to her at the Head of the aforesaid Close,
 “ opposite to the *Luckenbooths*. And depones, That immediately
 “ upon Mr. *Cameron*’s meeting with Mrs. *Hay*, and speaking with
 “ her, the Deponent was ordered home with his Lanthorn by Mrs.
 “ *Hay*, and accordingly went home, and did not hear any of the
 “ Conversation betwixt Mrs. *Hay* and Mr. *Cameron*. And depones,
 “ That it was about Eight or Nine when the Deponent went out as
 “ aforesaid with the Lanthorn; and it was betwixt Ten and Eleven
 “ that Night when Mrs. *Hay* returned home.”

Page 10. of
 Pursuer’s
 Proof.

And Mrs. *Ann Cameron* depones, “ That she knows Mrs. *Hay*
 “ principal Servant to Mrs. *Malcom*: That on one Evening about
 “ *Christmas* last she came to the Deponent’s Lodging along with Mr.
 “ *Cameron* the Pursuer’s Father.”

From the Depositions of these Witnesses there is legal Evidence, that the Pursuer’s Father, the chief Conductor and Manager of this Cause, had in the grossest Manner attempted to suborn one of the Witnesses, whose Evidence might have been material, if she had been wicked enough to swear as she was directed; and when it appears that so bold an Attempt was made upon a Lady connected with the Defender as Mrs. *Hay* was, who may be properly considered as her Guardian and Director, there is too much Reason to suspect, that the like Influence may have been used with some others of the Witnesses, who had not the Virtue to refuse as Mrs. *Hay* did.

The Defender shall conclude what she has to say upon this Part of the Cause with two or three general Observations. The *first* is, that

that the whole of the Witnesses, by whom this pretended Marriage is supposed to have been proved, are under very just Grounds of Suspicion; most of them were very nearly connected with the Pursuer, and all of them were under an absolute Necessity, either of swearing as they have done, or of acknowledging themselves guilty, or at least accessory to the Guilt of a forcible Marriage.

2dly, It is proved, that the Pursuer and his Associates had artfully contrived Matters so, that as far as possible none should be present at the Marriage, or in the Place where it happened, but such as were in his own Interest. And lastly, it is proved, as far as the Nature of the Thing could admit of, that the Pursuer's Father, the chief Manager and Conductor of this Cause, had attempted to suborn one of the Witnesses.

When all these Things are taken together, it is impossible for your Lordships to doubt, that this Marriage must have been carried on in a Manner which could not bear the Light; for if that had been the Case, the indirect Means which have been here used would not have been necessary.

In order to illustrate this, let it be supposed, that instead of celebrating the Marriage, this helpless Infant had been prevailed upon to execute a Testament, conveying her whole Effects to the Pursuer, and that upon her Death a Question had occurred concerning the Validity of such Testament between the Pursuer and her Sister, the Defender would ask, if the indirect Means which have been here used, would not have been judged sufficient to reduce such Testament; and if so, it is impossible to plead, that a less Degree of Consent is necessary to constitute Marriage, than what would have been necessary to validate any other Contract or Deed, which by its Nature might be perfected by Consent.

Thus far, with regard to the first Defence, that the Defender had never given any full or free Consent to this Marriage.

But 2dly, supposing it proved, that the Defender had given an absolute and full Consent, yet she is advised, that such Consent would not have been sufficient to constitute Marriage. It is proved, and indeed admitted by the Pursuer, that at the Time when this Marriage is supposed to have been celebrated, the Defender was only twelve Years and about four Months old; and tho' by the *Roman Law*, Females were presumed to be capable of Marriage at the Age of Twelve, yet it is otherwise by the *Law of Scotland*; for by the Law of this Country, Females

Females are not presumed to be capable of Marriage till the Age of Fourteen.

This is expressly laid down by *Skene*, in his most accurate Treatise *de verbor. signif.* under the Word *varda*, where he says, "For supposing
" Women of twelve Years of Age be the Civil Law may marry ane
" Husband, yet be the Law of this Realm she may not marry until
" she be fourteen Years compleat."

Here the Rule is laid down in express Words; and it cannot be supposed, that the learned Author was ignorant of the Laws of his own Country in a Matter so important; and, with Submission, it ought to have no Weight, that the Lord *Stair*, in the Title *Conjugal Obligations*, says, "That the Years of Pupillarity is commonly established in Law
" to be twelve in Females;" for here the Author does not give his own Opinion; and from other Parts of his Institutes it appears, that Females were not presumed capable of Marriage till the Age of Fourteen.

Thus, in Page 253, after observing that the Origin of the Casualty of Ward was, that the Vassal, during his Minority, was not capable of performing the Services due to the Superior, he adds, "Tho'
" this Capacity might be in some sooner, yet it is fixed in Men to their
" Majority at 21 Years compleat, and in Women till they be four-
" teen Years compleat, *for then they are capable of Husbands*, who
" may do the Service required of the Fee."

And again, in Page 262, the same Author has the following Words:
" The Termination of Ward in Females is determined to be their
" fourteenth Year compleat, *for they are then capable of Children.*"

And indeed it is a settled Point, agreed on by all the Authors who have wrote upon our Law, both ancient and modern, that in Female Vassals the Casualty of Ward ended at the Age of Fourteen; and the Reason uniformly given by all of them is, that at that Age they are capable of Marriage.

The learned *Craig*, in his Treatise *de feudis, dieg. 20. par. 4.* says, *In feminis brevius tempus custodiæ requiritur, non tam quod difficilius custodiantur, ut vulgus sentit, sed cum ad decimum quartum ætatis annum pervenerint, licet ipsæ, nec concilio domino prodesse possunt, nec bello; tamen, cum ea ætate nobiles sint, debent ex arbitrio dominorum elocari viris militibus, qui domino servitia militaria exequi, et concilio ei adesse possunt.*

And Sir *George MacKenzie* in his Institutes, pag. 91. Par. 3d, says,
" That in Female Vassals the Casualty of Ward lasts only till four-
" teen

“teen Years compleat, *because they may then marry Husbands:*” And the same very Doctrine is laid down by the learned Author of the late Institutes of the Laws, *vol. 1. p. 635.* where he says, “That the Ward of Females ends at the Age of 14; *because ordinarily they are then fit for Marriage*, and their Husbands should officiate for them.” And tho’ some of these Authors, adhering too closely to the *Roman Law*, have in other Parts of their Works mentioned twelve Years as the Age at which Females are presumed capable of Marriage; yet it appears to be contrary not only to the Principles of our Law, but also to the Constitutions of Females in this Part of the World, who it is very certain are absolutely unfit for Marriage at the Age of Twelve.

But *3tio*, tho’ it should be admitted, that twelve is the Age at which Females by the Laws of this Country are presumed capable of Marriage, yet even that will not avail the Pursuer. For in Marriage two Things are essential; *1st*, The Consent of the Parties; and *2dly*, that at the Time of the Marriage, both Parties should be capable to consummate the same. The Defender does not mean to say, that the *commixtio corporum* is essential to Marriage; but what she means is, that no Marriage can subsist, unless where both Parties were at the Time capable to consummate.

Among the *Roman* Lawiers, it was long disputed what was to be the Rule of judging, how far Persons within the Years of Minority were capable of Marriage. Some of the Lawiers who followed *Cassius* were of the Opinion, that *habitus corporis* was only to be regarded; others of them, the Followers of *Proculus* were of Opinion, that nothing more was necessary, than that the Parties should be past the Age of Fourteen; and a third Sett, who followed *Priscus Javolenus*, maintained, that both the Age and *habitus corporis* were to be regarded, and that no Person was capable of Marriage, but such as had not only arrived at the legal Age, but were also capable to consummate the Marriage.

These different Opinions are clearly laid down in *Ulpian’s* Fragments, *Tit. II. Par. ult.* The Words are, *Puberem autem Cassiani quidem eum esse dicunt qui habitu corporis pubes apparet, id est, qui generare potest. Proculeii autem eum qui quatuordecim annos explevit. Verum Priscus eum puberem esse, in quem utrumque concurrit, et habitus corporis et numerus annorum.*

This Text, which is abundantly clear, is explained at great Length in *Bynkershoek’s* Observations, *lib. III. cap. 24.* where he demonstrates clearly, that not only the Age, but also the *habitus corporis* was considered,

dered, where the Question was concerning the Validity of Marriage, and shows, that these Disputes continued down till the Time of the Emperor *Justinian*.

In like Manner, tho' by the Canon Law Males were presumed to be capable of Marriage at the Age of fourteen, and Females at the Age of twelve, yet the *habitus corporis* was still regarded; and therefore tho' the Parties had arrived at the legal Age, yet they were supposed not to be capable of Marriage, unless where the Habit of the Body was such as to render them capable to consummate.

This is clearly laid down in *lib. 4. tit. 2. cap. 3. decret. Greg. Puberes sunt quoad matrimonium, qui ex habitu corporis concipere et generare possunt. Quidam tamen ex annis pubertatem æstimant, id est, eum esse puberem qui quatuordecim annos implevit, quamvis tardissime pubescat. Certum autem est eum puberem esse, qui ex habitu corporis pubertatem ostendit, et generare jam potest.*

From this Text it plainly appears, that the Age of 14 alone was not judged by itself sufficient, but that it was also absolutely necessary, in order to constitute Marriage, that the Parties should be at the Time in such a Habit of Body as to be able to answer the chief End or Purpose thereof, *ita ut jam generare possunt.*

And accordingly *Vinnius*, in his Commentary upon the Title *De nuptiis prin. No. 2.* says, *Juris pontificii auctores pubertatem metiuntur ex potentia cœundi, non ex numero annorum.*

And indeed, when the Authors on the Canon Law are attentively considered, it will appear, that the Law went no further than to establish a general Presumption, that Males were capable of Marriage at the Age of fourteen, and Females at the Age of twelve; but then this was only a *præsumptio juris*, which might be defeated by a contrary Proof. For as on the one Hand it was sufficient to validate a Marriage contracted before the legal Age, if it could be proved, that the Parties were both *capaces generandi* before that Time; so on the other Hand, it was supposed to be relevant to annul a Marriage, contracted after the marriagable Age, if it could be proved, that either of the Parties were not capable at the Time of the Marriage.

This Doctrine is expressly laid down by *Sanchez* in his learned Treatise *De matrimonio, lib. 7. disput. 104. No. 4. Hinc deducitur in dubio, nec marem nec fœminam præsumi generationi aptos, ante dictam pubertatis ætatem completam; quare ante eam ætatem asserenti hanc aptitudinem incumbet*

incumbet onus probandi, utpote qui præsumptionem contra se habet. At impleta pubertate præsimitur hæc generandi potentia, ac subinde in eam negantem transfertur onus probandi. Est tamen præsumptio hæc juris tantum, contra quam contraria probatio admittitur.

Here the Doctrine is plainly laid down ; the marriagable Age established only a *præsumptio juris*, that the Parties were capable of Marriage ; which Presumption however might be defeated by contrary Evidence ; and in support of this Opinion a great Number of Authorities are cited.

And the same Author *Sanchez*, in the same Title No. 34. mentions the natural Rule by which it was determined, how far Females, at and about the Age of Puberty, were capable or not of Marriage, in the following Words : *Menstruum in fœmina sufficiet ad probandum aptitudinem ejus ad generationem. Ducor quod fœminæ, ex tempore quo menstruum habent, et non ante, concipere valent, ut docet Lyra cum multis aliis.*

From these Authorities it is proved, that by the Canon Law, as well as by the Civil Law, before the Time of *Justinian*, the Question how far Parties were capable of Marriage, did not depend singly upon the Age of the Parties, but that Regard was had also to the *habitus corporis*, so that none were judged capable of Marriage, but such as were at the Time capable to answer the chief End and Purpose thereof ; and, to what has been said upon this Subject, it is only necessary to add, that it is an agreed Point, among all the Authors upon our Law, that the Canon Law is of great Authority with us, in determining Questions concerning Marriage ; and if the Rule laid down by *Sanchez* is to be followed in the present Case, satisfying Evidence can be brought, that the Defender was not capable, according to his Sense of the Word, at the Time when this pretended Marriage was celebrated.

But in the *last* Place, supposing it proved, that the Defender had given a full and free Consent to this Marriage ; and supposing also, that she was at that Time capable of Marriage, yet all this will not avail the Pursuer. For as it is agreed on all Hands, that immediately after the Marriage Ceremony was over, the Defender had refused to complete the same, even by the Form of a Bedding, tho' no more was then insisted on, and as she did furthwith declare her Purpose to refile, when Matters were yet intire, she is intitled to be restored *in integram* ; for tho' it is indeed true, that after Marriage has been once consummated, no Restitution is competent on the Head of Minority, as
after

after that Parties cannot be restored to their former Condition, yet where there has been no Consummation, there can be no Reason for refusing Restitution against Marriage, as well as against any other Contract.

And here it is to be observed, that the Canonists made a Distinction between a *matrimonium ratum*, i. e. a Marriage only celebrated *in facie ecclesiae*, and a *matrimonium consummatum*. The first was not in every respect judged equal to Marriage, and Sanchez, Lib. 2. Disput. 13. N^o. 1. gives the Reason in the following Words, *quia solum per matrimonium consummatum fiunt conjuges una caro*.

For this Reason it was, that the *matrimonium ratum* was not understood to create any Tie of Affinity between either of the Parties and the Relations of the other; and for the same Reason it was, that tho' it was not understood to fall within the ordinary Powers of the Pope to dispense with Marriage once consummated, yet it was a settled Point, that he might dispense with a Marriage celebrated but not consummated, upon reasonable Causes, one of which is mentioned by Sanchez, Disput. 16. N^o. 7. *Quando alter conjugatorum asserit se non habuisse animum contrahendi, quod credo verum quando nullo modo induci possit ut praeſtaret verum consensum, et ita ex eo matrimonio tam coaſto graves inimicitiae orirentur*.

And tho' the Defender does not deny, that most of the Writers on the Canon Law were of Opinion, that after a Marriage was once celebrated *in facie ecclesiae*, the Marriage could not be dissolved by the mutual Consent of Parties, and that no Restitution was competent on the Head of Minority; yet it is material to observe, that the only Ground mentioned as the Foundation of these Opinions is, that in the Canon Law Marriage was considered as a *Sacrament*, which most certainly is not the Case by the Laws of this Country, which do not consider Marriage as a *Sacrament*, but as a Contract perfected by the Consent of Parties.

By the Canon Law, after the *decretum tridentinum*, no Marriage was valid but what was celebrated by a Priest *in facie ecclesiae*; whereas by the Laws of this Country, Marriage may be constituted in many other ways, such as, by Cohabitation for a Course of Years, by a Promise of Marriage with a subsequent *copula*, or even by a Declaration and Acknowledgment of the Parties before Witnesses.

From these Things it plainly appears, that by the Laws of this Country, Marriage is not considered as a *Sacrament*, but as a *civil*
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Contract ; and tho' it is admitted that after Consummation Restitution is not competent upon the Head of Minority, as after that the Parties cannot be reponed to their former Condition, yet, before Consummation, according to the Principles of our Law, there does not appear any Thing to hinder Restitution on the Head of Minority.

In order to illustrate this, let it be supposed, that the Marriage Ceremony had not been performed by any Person in Orders, but that the Parties had in Presence of the Witnesses declared themselves willing, and had instantly accepted of each other for Husband and Wife; it cannot be disputed, that this would have been sufficient to constitute Marriage by the Law of *Scotland*, as much as if the Marriage Ceremony had been performed. But let it be supposed, that in this Case the Defender had declared her Purpose to refile from the Contract, or, which comes nearer to the present Case, had declared she never meant to enter into it, can it be disputed, that in that Case, Restitution would have been competent? and if so, it is not easy to distinguish between a Marriage *declared* by the Parties in presence of Witnesses, and a Marriage *celebrated*, especially where, as in the present Case, the Ceremony was performed in a Manner not authorised by the Laws of this Country.

In respect whereof, &c,

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